IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM THOMAS THOMPSON, Plaintiff	:	CIVIL ACTION
v.	:	
BROWN & WILLIAMSON TOBACCO CORP, et al., Defendants	:	NO. 98-CV-4273

MEMORANDUM AND ORDER

J. M. KELLY, J. **OCTOBER 6, 1998**

Presently before the Court are Plaintiff William Thomas Thompson's Motion to Remand (Document Nos. 3 and 9) and "Affidavit for Removal" of the Court (Document No. 4).[1] Also before the Court are Motions to Dismiss by Defendants Brown & Williamson Tobacco Corp. ("Brown & Williamson") and British American Tobacco Ltd. (Document Nos. 5 and 7) and Plaintiff's Motion for an Extension of Time (Document No. 13). Because the Court concludes it cannot properly exercise jurisdiction in this case, Plaintiff's Motion to Remand is granted. Plaintiff's "Affidavit for Removal," Defendants' Motions to Dismiss, and Plaintiff's Motion for an Extension of Time are dismissed as moot.

[1]Plaintiff filed a "Motion to Strike" prior to filing his Motion to Remand. Because the Court believes the substance of Plaintiff's "Motion to Strike" is addressed by the Motion to Remand, the Court will not consider the "Motion to Strike" separately.

I. BACKGROUND

Plaintiff's present action is a resurrection of a suit dismissed by this Court in 1996. In that case, Plaintiff sued Brown & Williamson and a host of persons employed by the Pennsylvania Department of Corrections, and alleged that Defendants were liable under 42 U.S.C. § 1983 for selling tobacco products that apparently did not contain a Surgeon General's warning.[2] Plaintiff claimed that because there was no warning on the tobacco's packaging he was led to believe these particular tobacco products were safer to use than those with a warning on the label. He subsequently discovered, Plaintiff alleged, that all tobacco, regardless of packaging, may be harmful. Plaintiff, however, failed to allege specifically how he was injured by the tobacco he used, and this Court therefore dismissed the action, but gave Plaintiff leave to correct the various deficiencies of his complaint. Plaintiff did amend his complaint, but still failed to state a constitutional violation that would give rise to § 1983 liability. Accordingly, the Court dismissed Plaintiff's complaint as frivolous for a second time on December 12, 1996. Plaintiff appealed from this Order, and the Court of Appeals affirmed.

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[2]Plaintiff also alleged that the tobacco products in question did not contain a "Pennsylvania State Tax Stamp," which he seemingly believed raised an issue as to the propriety of the prison's taxation of those products.

Undeterred, Plaintiff filed an action based on essentially the same facts in the Court of Common Pleas of Philadelphia County. This time, however, Plaintiff brought only state claims and added several additional defendants, including Pennsylvania's governor, other state officials, and other tobacco companies. One of the original suit's defendants, Brown & Williamson, noticed the removal of the present action to federal court.

II. DISCUSSION

In its Notice of Removal, Defendant urges the Court to find it has jurisdiction over this action under 28 U.S.C. § 1332 and 28 U.S.C. § 1367. Defendant acknowledges that the Commonwealth of Pennsylvania is the real party-in-interest as far as the state and prison officials are concerned, and that these defendants accordingly cannot be considered "citizens" under 28 U.S.C. § 1332. See, e.g., Blake v. Kline, 612 F.2d 718, 726 (3d Cir. 1979), cert. denied, 447 U.S. 921 (1980). Defendant argues that the Court nevertheless can retain jurisdiction by setting the state defendants aside temporarily, recognizing the claims against the remaining defendants fall within the Court's diversity jurisdiction, and then bringing the state defendants back within the Court's jurisdiction under 28 U.S.C. § 1367.

The Court will not exercise supplemental jurisdiction over the state defendants. The Court of Appeals for the District of Columbia Circuit, in reliance on Owen Equipment & Erection Co. v.

Kroger, 437 U.S. 365 (1978), has held, "[t]he diversity statute, by speaking directly to the kinds of parties who can use it to enter federal court, impliedly prohibits courts from exercising pendent party jurisdiction to hear claims against persons or entities falling outside of the statute's scope in suits based on diversity." Long v. District of Columbia, 820 F.2d 409, 416 (D.C. Cir. 1987); see also Dahn v. District of Columbia, No. 88-3837, 1988 WL 138668 (4th Cir. Dec. 20, 1988) (unpublished decision). The court in Long therefore declined to exercise pendent jurisdiction over the District of Columbia, which could not be considered a "citizen" under § 1332. Although the court in Long considered only pendent jurisdiction, its reasoning, founded on its interpretation of Owen Equipment, appears unaffected by the subsequent passage of § 1367: Congress designed § 1367(b)'s exceptions to the mandatory exercise of supplemental jurisdiction to preserve the effect of Owen Equipment. Erwin Chemerinsky, Federal Jurisdiction § 5.4 (2d ed. 1994).

Further, the result encouraged by Long is supported by the Third Circuit's decision in Brown v. Francis, 75 F.3d 860 (3d Cir. 1996). In Brown, the district court found the Territory of the Virgin Islands was a "citizen" under § 1332, and consolidated a related suit with the case in which the Territory was involved. Id. at 866. The Court of Appeals found that the district court erred in exercising jurisdiction over the Territory because it is

a state for the purposes of diversity of citizenship. Id. at 865-66. The Court of Appeals further found that this error was not remedied by the district court's consolidation of the Territory's case with one properly before the district court. "Neither consolidation with a jurisdictionally proper case nor an agreement by the parties can cure a case's jurisdictional infirmities." Id. at 866. The Court of Appeal's reasoning is equally appropriate here. Accordingly, following the analysis of the courts in Long and Brown, the Court finds it cannot exercise supplemental jurisdiction over the state defendants.

Although the Court will not exercise supplemental jurisdiction over the state defendants, the Court conceivably may sever the claims and remand only the state defendants while retaining jurisdiction over the tobacco defendants. See Fed. R. Civ. P. 21. The Court may sever these claims, however, only if the state defendants are dispensable parties to the claims against the tobacco defendants. See Newman-Green v. Alfonzo-Larrain, 490 U.S. 826, 835-36 (1988). "Indispensable parties are persons who, in the circumstances of the case[,] must be before the court . . . ." Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1011 (3d Cir. 1987) (citing 3A J. Moore, Moore's Federal Practice ¶ 19.02), cert. dismissed, 484 U.S. 1021 (1988). In the case before the Court, Plaintiff has alleged various conspiracies exist between the state officials and the

tobacco manufacturers. However implausible these claims may be, the Court finds the state defendants are indispensable parties to these claims. The Court, therefore, will decline to sever the claims against the tobacco defendants from those against the state defendants, and will remand the entire action to the Court of Common Pleas of Philadelphia County.

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O R D E R

AND NOW, this 6th day of October, 1998, in consideration of Plaintiff William Thomas Thompson's Motion to Remand, it is hereby **ORDERED**:

1. Plaintiff's Motion to Remand (Doc. Nos. 3 and 9) is **GRANTED**;

2. Plaintiff's "Affidavit for Removal" (Doc. No. 4) and Motion for an Extension of Time (Doc. No. 13) are **DISMISSED** as moot; and

3. Defendant Brown & Williamson Tobacco Corp.'s and Defendant British American Tobacco Ltd.'s Motions to Dismiss (Doc. Nos. 5 and 7) are **DISMISSED** as moot.

BY THE COURT:

JAMES McGIRR KELLY, J.